



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

5 POST OFFICE SQUARE SUITE 100

BOSTON, MASSACHUSETTS 02109-3912

May 22, 2013

Brian Kavanah, Director
Division of Water Quality Management
17 State House Station
Augusta, Maine 04333-0017

Dear Mr. Kavanah:

Thank you for the opportunity to review Maine's draft small MS4 general permit. EPA appreciates the efforts of the DEP staff in the development of this permit. EPA offers the following comments on the draft permit.

1. The draft permit does not have a fact sheet as required by 40 CFR §124.8(a) which states: "A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every Class I sludge management facility, for every 404 and NPDES general permit..." Inclusion of a fact sheet facilitates the understanding of the requirements of the draft permit and documents the regulatory basis of its conditions. Many of EPA's comments which seek clarification on a particular permit conditions could have been addressed with a comprehensive fact sheet. Please refer to 40 CFR §124.8(b) for the required contents of a fact sheet. Specifically, 40 CFR §124.8(b)(4) requires "a brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record..." Many of the comments raised could have been addressed with the inclusion of a fact sheet.
2. Part I.A - "Unless otherwise explicitly noted, this permit only covers operations or activities associated with stormwater runoff from the regulated small MS4 within an urbanized area." As written, it appears that it is DEP's intent that this permit will not be used for MS4s designated under authorities of 40 CFR §§ 122.26(a)(9)(i)(C) or (a)(9)(i)(D). Is this interpretation correct? Does DEP anticipate a separate permit for any designation under either criteria?
3. Part I.D.4 - EPA has significant concerns with this provision and its implied interpretation. The first sentence is not clearly written. Its actual intent should be clearly articulated rather than left to a reader's interpretation. EPA interprets this language as allowing a discharge to be inconsistent with the wasteload allocation (WLA) of an approved total maximum daily load (TMDL) if the TMDL does not provide "adequate information to develop specific measures to protect water quality, and any

implementation for the waterbody to which the direct discharge drains.” EPA’s review of previous drafts requested clarification on this provision. The explanation DEP provided was that this provision is based on 40 CFR §122.34(e)(2). EPA believes that the provision in 40 CFR §122.34(e)(2) has been taken out of context and misinterpreted. The language referenced as the basis for this condition is clearly labeled as “Guidance.” The language at 40 CFR §122.30(a) provides a clear explanation of the “guidance” included within the stormwater regulatory language...”EPA has clearly distinguished its recommended guidance from the rule requirements by putting the guidance in a separate paragraph headed by the word ‘guidance’”. DEP may rely on the guidance provided, but the guidance itself is not intended to be inserted as permit language.

The language in 40 CFR §122.34(e)(2) states that additional controls beyond the minimum control measures should not be imposed on a regulated MS4 “...except where an approved TMDL or equivalent analysis provides adequate information to develop more specific measure to protect water quality.” When an approved TMDL includes a WLA for a particular discharge, the permit must include requirements that are consistent with the assumptions and requirements of the approved TMDL. EPA is not aware of any exceptions to this requirement as seemed to be implied by the provision in Part I.D.4. There are several approved TMDLs in Maine and the permit requirements must reflect this fact.

EPA strongly recommends removal of this language. Or if the language is retained, EPA suggests the following wording: *This general permit does not authorize a direct discharge that is inconsistent with the WLA of any EPA approved TMDL.*

4. Part IV.A.1.b – This section states that additional stormwater treatment controls are necessary for Urban Impaired Stream watersheds. The draft permit requires the permittee to implement structural and non-structural measures “...necessary to control, to the maximum extent practicable, the discharge of stormwater...” The maximum extent practicable standard is not appropriate for water quality impaired segments. In the preamble to the Phase II rule EPA states: “Absent evidence to the contrary, EPA presumes that a small MS4 program that implements the six minimum control measures in today’s rule does not require more stringent limitations to meet water quality standards...however, small MS4 permittees should modify their programs if and when available information indicates that water quality considerations warrant greater attention or prescriptiveness in specific components of the municipal program...” (64 FR 68753) Identification of a water as an “urban impaired stream” clearly indicates that the stream is not meeting applicable water quality standards. The presumption envisioned in the preamble fails because evidence indicates that water quality standards are not met and therefore, stormwater controls greater than “maximum extent practicable” are needed in these urban impaired streams. The phrase “maximum extent practicable” should be removed.
5. Part IV.H.1- Public Education and outreach on stormwater impacts. – EPA recognizes the comprehensive public education required by the permit. However, without the assistance of a fact sheet explaining the basis of some of the requirements, understanding the

elements of the required plans and how they all work together and when they must be completed is not straight forward. For example, the Awareness Plan must be developed by February 1, 2014; submitted to DEP by December 1, 2013; and considered approved by February 1, 2014. It is unclear why a plan that must be developed by February 1, 2014 has to be submitted in December of the previous year. Other dates within this section also require development of a plan after the required submission date. Consider language such as: *No later than...*

Are there any minimum criteria associated with the components of the Awareness Plan? It appears from the draft permit language that all elements are decided upon by the permittee, and approved by the Department. Is this a correct interpretation?

Paragraph a.ii.1 references "a Plan to Raise Awareness" while paragraph a.ii.2. references a "Municipal Awareness Plan". One can assume these are the same, but because of the different names they may not be. The Department should use consistent terms or explain the difference in a fact sheet.

Paragraph a.iv.3. also contains what seems to be confusing dates. The draft permit requires a draft plan by July 1, 2014 which details how the permittee will meet the requirements in paragraph a.iv.1 or 2 with the elements found in paragraph a.iv.3 (a-h) by November 1, 2014. It is unclear what, if any, actual requirements in paragraphs (a-h) have to be met in November because the permit indicates that implementation of the plan doesn't begin until January 5, 2015. As mentioned previously, these types of clarifications should be addressed in a fact sheet.

The draft permit contains both "required strategies" and "suggested strategies". Is it appropriate to assume that the suggested or recommended strategies are optional for all permittees?

6. DEP should not use "verbal" communication as a method of communication regarding "non-approval" of a plan. The opportunity for miscommunication is increased without clearly written documentation. EPA recommends written communication for records of approval (or non-approval) of plans. This comment applies to all sections of the permit that provide for verbal communication.
7. Part IV.H.3 – Illicit discharge detection and elimination
Paragraph 3.a.iii appears to require new permittees (those not covered by the 2008 general permit) to do dry weather outfall inspections in a (e.g. one) watershed or subwatershed that the permittee identifies as a priority. Is a new permittee required to focus only on the one watershed or subwatershed during the permit term? Are outfalls within the MS4 not located in the identified priority watershed required to be inspected in dry weather? When do these inspections occur? This would appear to miss many opportunities to identify and remove illicit discharges during the permit term.

For permittees covered by the 2008 general, dry weather inspections are to occur in two highest priority sub-watersheds approved by DEP. Why is there no approval for the

identified watersheds for the new permittees? Does "subsequent permit years" refer to this permit term of 2013 – 2017? Or some other term?

Paragraph 3.b.v. – The draft permit requires drive by evaluation and documentation of septic systems. What is the evaluation that is performed? What type of documentation is made? Consider requirements to coordinate with the local department which oversees septic systems. This may provide more useful information. What is the basis for a Department determination that a "drive by evaluation" will result in information which will allow a permittee to implement appropriate control measures?

Paragraph 3.c – Non-stormwater discharges – How will the Department make a determination that a non-stormwater discharge contributes to a violation of water quality standards? The draft permit also allows for the permittee to address only those non-stormwater sources that the permittee determines are a significant contributor of pollutants. How will the Department address a situation where the permittee determines a discharge is not a significant contributor of pollutants to its MS4, but the Department determines that the discharge contributes to a violation of water quality standards? Are non-stormwater discharges determined to contribute to a violation of a water quality standard prohibited? This should be clearly stated if that is the case.

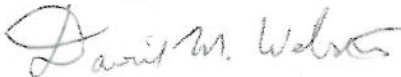
8. Part IV.H.4 – Construction site stormwater runoff control – According to the regulations, it is acceptable for the permittee to rely on another entity or program for meeting the requirements of the permit. The Department must document that the referenced program meets the requirements of 40 CFR §122.34(b)(4). This documentation should be included in the required fact sheet. During Maine's Permit Quality Review lack of documentation was noted as a deficiency and identified as an "Action Item." This Action Item appears on the Department's Priorities and Commitment List for FY2013. Item 90 on this list states "Implement Action Item: When developing new MS4 permits, document state's ability to fulfill all requirements specified in federal MS4 regulatory requirements under either MCGP or Chapter 500, Stormwater Management, or directly in the MS4 permit." This documentation should be included as part of the administrative record of the permit.
9. Part IV.H.5 – Post construction stormwater management in new development and redevelopment - The Department should include practices aimed at management of post construction runoff. For example, require management of a specific sized storm event. Encourage the use of practices that infiltrate, harvest or evapotranspire stormwater. Significant opportunities for proactive stormwater management are lost by focusing on inspections.
10. Part IV.I – Sharing Responsibility. The regulations allow for MS4s to share responsibility with another entity as well as allow for MS4s to use another required program as meeting the requirements of the minimum control measure. The language in Paragraph 1 of this section seems to follow the language of 40 CFR § 122.35. However, the language in 40 CFR §122.35 does not use the term "qualifying local program." This section describes what a permittee must do to demonstrate that reliance on another entity does in fact meet the requirements of the minimum control measure.

The term "qualifying local program" is used in 40 CFR §122.34(c). The regulation states that if an existing program requires the permittee to implement one or more of the minimum control measures, the permitting authority may include conditions in the permit that direct the permittee to follow the qualifying program's requirements. The draft permit does not identify existing programs but rather allows the permittee to reference them. What assurance does the Department have that the local program qualifies as meeting the appropriate requirements of a minimum control? It appears that the Department has modified the meaning of "qualifying local program" from that contained in regulation. The Department should provide an explanation of this change.

11. Part IV.K – Impaired waters and total maximum daily load (TMDL) – EPA has significant concerns with this section. This section does not adequately address the requirements of 40 CFR §122.44(d)(1)(vii) which state: "When developing water quality based effluent limits under this paragraph the permitting authority shall ensure that...(B)...are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR §130.7." Both the Statewide bacteria TMDL and the Impervious Cover (IC) TMDLs establish WLAs for stormwater. Permit requirements must include conditions designed to be consistent with the WLA. If the Department has negotiated with the municipalities affected by the TMDLs, as is indicated in the TMDL report sections that explain TMDL implementation responsibilities and regulatory impacts, those negotiated conditions (e.g., what constitutes adequate progress in addressing the impairments) should be included in the permit and the Department should document its assertion that the conditions are consistent with the WLA.
12. Additionally, the permit does not address discharges to impaired waters without an approved TMDL. The Department should explain how the permit ensures that discharges to impaired waters without an approved TMDLs are addressed such that the discharge is not contributing the pollutant identified as the cause of the impairment.
13. The permit must be consistent with the state anti-degradation policy. How is this addressed?

If you have any questions or wish to discuss these comments, please contact Thelma Murphy at 617-918-1615.

Sincerely,



David Webster, Chief
Water Permits Branch

cc: David Ladd, MEDEP

